

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WSG 68

Date Signed: September 27, 1991

MEMORANDUM

SUBJECT: Final Guidance On Emergency Authority under Section 1431 of the Safe Drinking Water Act

FROM: James R. Elder, Director
Office of Ground Water and Drinking Water

Frederick F. Stiehl,
Enforcement Counsel for Water
Office of Enforcement

TO: Water Management Division Directors
Regions I - X

Regional Counsels
Regions I - X

This memorandum transmits the Office of Ground Water and Drinking Water (OGWDW) and Office of Enforcement (OE) final guidance on invoking EPA's emergency authority, granted under Section 1431 of the Safe Drinking Water Act (SDWA), to address water supply hazards. This guidance has been reviewed and received concurrence from the Office of General Counsel (OGC). This final guidance replaces the EPA December 28, 1976 guidance (Water Supply Guidance No. 10), entitled "Regional Guidance - Emergency Action on Water Supply Hazards".

We want to thank the Regions for their thorough review of the draft guidance and valuable input. A summary of the comments received and our responses is included as an attachment to this memorandum. If you have any questions regarding this final document, please call Anne Jaffe Murray in OGWDW on 260-7358 or Alan Morrissey in OE on 260-2855.

Attachment

cc: Regional Drinking Water/Groundwater Protection Branch Chiefs



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WASHINGTON, D.C. 20460

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cc: Regional Drinking Water/Groundwater Protection Branch Chiefs

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CONCURRENCES							
SYMBOL	WPMSCS	LEBWA	CAS	WFC	CAS	WHSS-E	6-172
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DATE	9/14/91	9/14/91	8/15/91	9/14/91	8/19/91	10/1/91	9/14/91

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GUIDANCE ON INVOKING EMERGENCY AUTHORITY UNDER SECTION 1431 OF THE SAFE DRINKING WATER ACT

Purpose of Guidance

This guidance is intended to emphasize that Section 1431 has a broad application and provides EPA with an effective tool for handling public health endangerments concerning public water supplies (PWSs) and underground sources of drinking water (USDWs). One of the purposes of this guidance is to encourage a more widespread use of EPA's Section 1431 authority by more fully explaining situations where this authority may be applied. In addition, this guidance discusses EPA's internal procedures for issuing Section 1431 orders and provides information on how to support and prepare an order.

Contents

This guidance is organized as follows:

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Disclaimer

This guidance document on the application of EPA's emergency powers under Section 1431 of the SDWA is a statement of Agency policies and principles. It does not establish or affect legal rights or obligations. This guidance document does not establish a binding norm and is not finally determinative of the issues addressed. Agency decisions in any particular case will be made by

applying the law and regulations to the specific facts of the Case. The Agency may take action at variance with this guidance.

Overview

Introduction

Contaminants may be present in or released into the environment as a result of inadequate treatment of drinking water by a PWS, a leaking underground storage tank, or failure of an underground injection (UIC) well, to name a few. These incidents may result in contamination in or near a PWS or USDW that may pose an “imminent and substantial” endangerment to human health. Authority granted under SDWA Section 1431, 42 U.S.C. Section 300(i), gives the Administrator broad powers to take appropriate enforcement action if he receives information that:

- A **contaminant** is **present** in or **likely to enter** a **PWS** or **USDW**, and
- The contaminant **may** present an “**imminent and substantial endangerment**” to human health, and
- The appropriate State and local authorities **have not acted** to **protect public health**.¹

The purpose of a Section 1431 action is to prevent an impending dangerous condition from materializing, or to reduce or eliminate a dangerous situation once it has been discovered. Section 1431 does not require an emergency in the ordinary sense of the word. Instead, this provision focuses on “imminent and substantial endangerments” which is a broadly defined concept (see discussion below). For example, one major function of Section 1431 is its use as a preventative enforcement measure.²

As an “emergency” provision, however, Section 1431 should not be used as a substitute for other SDWA provisions, where such other provisions are adequate to protect public health.³ For example, under the Public Water System Supervision (PWSS) Program, violations of monitoring requirements or even of a maximum contaminant level (MCL) should generally be addressed through use of the enforcement authorities (including administrative order authority) in Section 1414. However, if the MCL exceedance may present an imminent and substantial endangerment, then an emergency action under Section 1431 may be appropriate in addition to any other SDWA Section 1414 enforcement action. An example under the UIC Program would be a Class V UIC well operator who is injecting contaminants that may be causing or contributing to an MCL exceedance or otherwise endangering an USDW. Although this generally would be enforced as a violation of Section 1423, a Section 1431 action also may be appropriate if an imminent and substantial endangerment may be present.

1986 Amendments to Section 1431

The SDWA Amendments Of 1986 clarified EPA's existing authority to order the provision of an alternative water supply by persons who caused or contributed to the endangerment. In addition, the 1986 Amendments strengthened EPA's authority to enforce Section 1431. Previously, Section 1431 provided that EPA could enforce against any person who “willfully” violates or fails or refuses to comply with a Section 1431 order. The 1986 Amendments removed the term “willfully” enabling EPA to enforce against any persons, whether or not their actions were willful. Also, the 1986 Amendments clarified EPA's authority to protect USDWs, as discussed on page 4. (Section 1431, as modified by the 1986 Amendments is contained in Attachment 1.)

Delegation of Authority

On July 25, 1984 the Administrator delegated the authority to issue administrative orders under Section 1431 to the Regional Administrators (RAs) and the Assistant Administrator for Water (Delegation No. 9-17). In some Regions the RA has redelegated this authority to the division or branch level. The authority to make direct civil judicial referrals under Section 1431 has not been delegated by Headquarters to the Regions.

Elements of Section 1431 Authority

To apply the authority granted under Section 1431, two conditions must be met. First, the Administrator must have received “information that a contaminant which is present in or likely to enter a [PWS] or an [USDW] may present an imminent and substantial endangerment to the health of persons.” Second, the Administrator must have received information that “appropriate State and local authorities have not acted to protect the health of such persons.” To realize the full potential of Section 1431, the key elements of these conditions must be understood. These elements are: contaminants that are covered under Section 1431, the definition of “likely to enter”, application to PWSS and USDWs, and the definitions of “imminent” and “substantial”. Each element is discussed in greater detail in this section.

Contaminant

Section 1401(6) of the SDWA defines “contaminant” very broadly to include “any physical, chemical, biological, or radiological substance or matter in water. If under this broad definition, EPA may take action under Section 1431 even when the contaminant in question is **not** regulated by a National Primary Drinking Water Regulation (NPDWR) under the SDWA (i.e., EPA has not issued a

NPDWR for the contaminant or the regulation has been promulgated but is not yet effective). This authority is clearly supported by the SDWA legislative history. (See H.R. Rep. No. 1185, 93rd Cong., 2d Sess., 35 - 36. The discussion of section 1431, in this 1974 House Report is shown in Attachment 2 of this guidance.)

Likely to Enter

Application of the Section 1431 authority is not limited to existing contamination of a PWS or USDW but also may be used to prevent the introduction of contaminants that are “likely to enter” drinking water. Thus, Section 1431 Orders should ideally be issued early enough to **prevent** the potential hazard from materializing.⁴

Underground Sources of Drinking Water

EPA's Section 1431 authority is not limited to the protection of PWSS. It also extends to the protection of all USDWs, whether or not the USDW currently supplies a PWS. The 1986 Amendments clarified EPA's existing authority to protect USDWs by making this authority explicit in the statute.

The agency has defined “underground sources of drinking water” in 40 CFR Section 144.3. Under this definition, “USDW” includes both aquifers that currently supply a PWS and those that simply have the potential to supply a PWS (according to the criteria in Section 144.3).⁵ The ability to address the contamination of USDWs (rather than only PWSS) broadens EPA's authority in two ways. First, it allows EPA to act under Section 1431 where the groundwater source in question is only a potential supplier of a PWS. Second, it allows the Agency to protect private wells that are at risk because of the contamination or threatened contamination of a USDW.

Imminent and Substantial Endangerment

Assuming EPA can show that a contaminant is “present in or likely to enter” the drinking water supply (either PWS or USDW), EPA also must show that a contaminant “may present” an “endangerment” and that the endangerment is both “imminent and “substantial.”

Imminent Endangerment

Section 1431 authorizes EPA to address “endangerments” that are “imminent”. The case law that has developed on these terms (as used in the SDWA or in analogous provisions of other statutes), together with the SDWA legislative history, suggests the following guidance.

An “endangerment” is not actual harm, but a threatened or potential harm.⁶ No actual injury need ever occur.⁷ Therefore, while the threat or risk of harm must be “imminent” for EPA to act, the

harm itself need not be.⁸ Public health may be endangered imminently and substantially both by a lesser risk of a greater harm and by a greater risk of a lesser harm; this will ultimately depend on the facts of each case.⁹

An endangerment is “imminent” if conditions which give rise to it are present, even though the actual harm may not be realized for years.¹⁰ Courts have stated that an “imminent hazard” may be declared at any point in a chain of events which may ultimately result in harm to the public.¹¹ For example, in U.S. v. Midway Heights County Water District,¹² individuals were exposed to microbiological and turbidity exceedances, but actual illnesses had not yet been reported. The court found that the presence of organisms that were accepted indicators of the **potential** for the spread of serious disease presented an imminent (and substantial) endangerment.

Endangerments can more readily be determined to be imminent where they involve contaminants that pose acute human health threats. Examples include:

- A nitrate MCL violation when a sensitive population is exposed (i.e., infants less than six months of age)
- A waterborne disease outbreak with or without MCL violations
- A microbiological or turbidity MCL Violation with or without a waterborne disease outbreak
- Injection of untreated sewage directly into an USDW that is used by a nearby drinking water well.

However, acute contaminants are not the only ones that might pose an imminent endangerment. Because an endangerment is created by the **risk** of harm, not necessarily actual harm, EPA should determine whether a **risk** of harm is imminent. Therefore, contaminants that lead to chronic health effects, such as carcinogens, also may be considered to cause “imminent endangerment”¹³ even though there is a period of latency before those contaminants, if introduced into a drinking water supply, might cause adverse health effects. In the SDWA legislative history, the House Report specifically states that an imminent endangerment may result from exposure to a carcinogenic agent.¹⁴

Section 1431 should not be used in cases where the risk of harm is remote in time or completely speculative in nature.¹⁵ However, in determining the imminence of a hazardous condition, EPA may consider the time it may require to prepare orders, to commence and complete litigation, to implement and enforce administrative or judicial orders to protect public health, and to implement corrective action under Section 1431.¹⁶ For example, even where a contaminant is not likely to enter a ground water supply for several months or longer (as can be the case with a ground water plume moving toward a well), EPA may consider this hazard to be “imminent” in light of the time required to

implement the actions described above. Further, even where a hazardous condition has been present for some time (even years), case law supports the view that EPA is not prevented from finding that the conditions present an imminent endangerment.¹⁷

In addition, Section 1431 may be used to address threats to health from other than direct ingestion of drinking water. For example, in U.S. v. Midway Heights County Water District,¹⁸ individuals were exposed to bacteriological and turbidity contamination. The court determined that although the water primarily was not used for drinking water, an imminent and substantial endangerment existed from “human consumption” through such normal uses as bathing, showering, cooking, dishwashing, and oral hygiene.

Substantial

The term “substantial endangerment” can apply range of existing or threatened hazards and should not be limited to extreme circumstances. One court, interpreting “substantial endangerment” as used in CERCLA, has stated that “the word ‘substantial’ does not require quantification of the endangerment (e.g., proof that a certain number of persons will be exposed, that ‘excess deaths’ will occur, or that a water supply will be contaminated to a specific degree).”¹⁹ Instead, the court found, an endangerment is substantial if there is a reasonable cause for concern that someone may be exposed to a risk of harm. The court stated that a number of factors (e.g., the quantities of CERCLA hazardous substances involved, the nature and degree of their hazards, or the potential for human exposure) may be considered in determining whether there is a reasonable cause for concern, but in any given case, one or two factors may be so predominant as to be determinative of the issue.²¹ Of course, the emergency authority of Section 1431 should not be used in cases where the risk of harm is completely speculative in nature or is de minimis in degree.²¹

House Report 93-1185 gives the following examples of what may be considered a “substantial” endangerment:

- “a substantial likelihood that contaminants capable of causing adverse health effects will be ingested by consumers if preventative action is not taken”
- “a substantial statistical probability exists that disease will result from the presence of contaminants in drinking water”
- “the threat of substantial or serious harm (such as exposure to carcinogenic agents or other hazardous contaminants).²²

Role of State or Local Authority

One of the crucial requirements of a Section 1431 enforcement action is that “appropriate State and local authorities have not acted to protect the health of such persons.” One court has held that the receipt of such information is a jurisdictional prerequisite to action under this section.²³ Accordingly, Section 1431 should not be used to deal with problems that are being handled effectively by State or local governments (including Tribal governments) in a timely fashion.²⁴

The Regions should not view this standard - whether a State or local authority has acted to protect the health of persons as an issue of whether these authorities have “failed” to protect public health. Instead, these authorities intentionally may defer action to EPA because the Section 1431 authority may be more powerful or expeditious. In addition, the State or local authorities may not have acted because they lack jurisdiction, as may be the case with actions involving Tribal entities. Further, State or local authorities may decide to take action jointly with EPA. In such cases, EPA would determine that State and local authorities have not acted (on their own) to protect the health of persons. Therefore, EPA may proceed with Section 1431 actions when State and local authorities are working jointly with EPA.

Section 1431 also provides that prior to taking action and to the extent practicable in light of the imminent endangerment, EPA shall consult with the State and local authorities to confirm the information on which EPA is basing the proposed action and to determine what action the State and local governments are taking or will take. Under Section 1431, then, it is not mandatory to consult with the State and local authorities (i.e., they should be contacted “to the extent practicable”). Nevertheless, the Regions should be aware that EPA will need a basis in the record for the finding in the Section 1431 Order that State and local authorities “have not acted to protect the health of persons.” The Regions should ensure, therefore, that there is a written basis in the record for this finding. This written basis could be simply a log of a telephone conversation or correspondence between EPA and the State and local authorities.

If EPA has information that State/local agencies are going to act, EPA must decide whether the action is timely and protective of public health. If EPA determines that the action is insufficient and State and local agencies do not plan to take stronger or additional actions to ensure public health protection, in a timely way, EPA should proceed with an action under Section 1431.²⁵

Unlike under Section 1414 or 1423, a notice of violation (NOV) need not be issued prior to taking a Section 1431 action. Note that, because Section 1431 applies to threatened as well as existing harm, a regulatory violation may not yet exist at the time EPA issues the Section 1431 Order. An NOV, even if issued, would not be a means of consulting with the State and local authorities to determine whether they have acted in a timely and appropriate manner to protect the health of persons. An NOV serves only as a means of informing the State, PWSS, or UIC owner or operator of EPA’s intention to take an action. However, the Region may want to issue an NOV (in addition to a Section 1431 order) as part of developing a separate enforcement action under Section 1414 or 1423.

The Regions should note that they need to determine that both State and local authorities have failed to act before bringing a Section 1431 action. The State can be of assistance to EPA in making this determination because the State should be able to identify the appropriate local authorities and may be aware of whether these authorities have taken any actions.

Remedial Actions That May Be Ordered

Once EPA determines that action under Section 1431 is needed, a very broad range of options is available. The statute provides that EPA may take actions as may be necessary to protect the health of persons. Moreover, EPA may take such actions notwithstanding any exemption, variances permit, license, regulation, order, or other requirement that would otherwise apply.²⁶

The actions that EPA may take may include (but are not limited to):²⁷

- issuing orders as necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring:
 - the provision of alternative water supplies, **at no cost to the consumer**, by persons who caused or contributed to the endangerment (e.g., provision of bottled water, drilling of new well[s], connecting to an existing PWS)
 - information about actual or impending emergencies
 - public notification of hazards (e.g., door-to-door, posting, newspapers, electronic media)
 - a study to determine the extent of the contamination, including inventory and monitoring of PWSS and private wells or ground water
 - an engineering study proposing a remedy to eliminate the endangerment and a timetable for its implementation
 - the halting of the disposal of contaminants that may be contributing to the endangerment.
 - Commencing a civil action for appropriate relief including a restraining order, or a temporary or permanent injunction. The injunction would require the PWS, UIC well owner or operator, or the responsible party to take steps to abate the hazard.

Use of Judicial vs. Administrative Orders

The Region will need to choose between a Section 1431 administrative order or a civil judicial action. A civil referral will be preferable to a Section 1431 administrative order if the Region believes the responsible party will be uncooperative or recalcitrant or if the necessary relief is long-term or otherwise appropriate for supervision by a U.S. District Court. Because all 1431 referrals are indirect, the Region must first transmit them to the Office of Ground Water (OGWDW) and Office of Enforcement (OE) for concurrence before sending them to the Department of Justice (DOJ). Headquarters will review and obtain the necessary concurrences as quickly as possible.

If immediate relief is necessary, an expedited referral is possible through the use of a telephone referral. The Region should send (via FAX) a very brief memorandum describing the problem, the potential or actual health effects, and the action required by the identified parties to Headquarters (OGWDW and OE) and DOJ. Upon receipt of the information, Headquarters will arrange a conference call with all involved parties and obtain necessary concurrences as soon as possible. Please note that DOJ has filed a complaint and a motion for a temporary restraining order in as little as one day.

A Section 1431 administrative order offers EPA some unique powers. Unlike compliance orders, Section 1431 Orders enable the Agency (versus the courts) to order actual injunctive-type relief. This relief is limited only by the usual constraints of the Administrative Procedures Act (APA). These require all Agency actions be reasonable and not “arbitrary or capricious”.²⁷ Thus, by issuing an administrative order instead of filing a civil judicial action, the Agency rather than the District Court determines the scope and timing of appropriate relief in the first instance.

The recipients of the administrative order may challenge the terms of the order. Under the judicial review provisions of Section 1448 of the SDWA, however, the petition must be filed within 45 days in the appropriate **Court of Appeals** (a District Court does not have jurisdiction to hear challenges to the administrative order). If the recipient fails to meet this condition, he loses all rights to contest the terms of the order.

Any enforcement actions to require compliance with an administrative order or to seek civil penalties for its violation must be in **District Court**. A recipient who violates or fails or refuses to comply with the terms of the administrative order, may be subject to a civil penalty of not more than \$5,000 for each day in which the violation occurs or failure to comply continues.²⁸

Relationship between Section 1431 and Other EPA Emergency Authorities

A Section 1431 order can be taken in conjunction with emergency orders under other statutes. Emergency provisions exist under:

- Resource Conservation and Recovery Act (RCRA) - Section 7003
- Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) - Section 106
- Clean Water Act - Sections-504(a) and 311
- Toxic Substances Control Act - Section 7
- Clean Air Act (CAA) - Sections 112(r)(9) or 303

Although similar in general terms, each of the emergency provisions of these statutes is somewhat different. (Guidance on EPA's authority to address imminent and substantial endangerment under CERCLA, RCRA, and CAA has been issued by the Agency.)²⁹ For example, Section 7003 of RCRA is very broad in that it allows for protection of the "environment". However, it is somewhat limited in that the threat must be caused by a "solid waste".

Section 1431, on the other hand, is limited to the protection of a PWS or an USDW, but covers a broad universe of "contaminants". It is generally recommended that the Regions issue joint orders under more than one of these statutory authorities, when possible, in order to maximize the Agency's authority and minimize the risk of successful judicial challenge. However, if the order is being unduly delayed by coordination difficulties, the Region should proceed with the Section 1431 order, followed by an order under the other statute or statutes.

An important exception to this recommendation is that it may be inadvisable to combine a CERCLA Section 106 or RCRA Section 7003 order with a SDWA Section 1431 order. One advantage of the CERCLA and RCRA orders is that they generally are not subject to "pre-enforcement" judicial review. That is, recipients of a CERCLA or RCRA order generally may not challenge that order in a court at the time they receive it, but must wait until EPA brings a court action to enforce the order. In contrast, SDWA Section 1431 orders generally are subject to "pre-enforcement" judicial review. Because "pre-enforcement" review of the Section 1431 portion of the order would be available, the Agency's ability to avoid "pre-enforcement" review of the rest of the order (*i.e.*, the portions issued under CERCLA or RCRA authorities) might be jeopardized. However, if the Region is reasonably confident that it will enforce the order expeditiously if the recipient refuses to comply, this issue may not arise.

Because of the importance of this issue, the Regions should not issue a SDWA Section 1431 order jointly with a CERCLA Section 106 or RCRA Section 7003 order without first consulting Office of General Counsel (OGC) and OE.

Parties over Whom Section 1431 Grants EPA Authority

Section 1431 by its terms gives EPA broad discretion to issue any orders necessary to protect the health of persons. EPA may issue Section 1431 Orders not only to an owner or operator of a PWS, but also, for example, to State or local government units, State or local officials, owners or operators of underground injection wells, area or point source polluters, or to any other person whose action or inaction requires prompt regulation to protect public health.³⁰ This authority authorizes the issuance of an order to a Tribal Government or Federal agency. (If the order involves a Tribal entity, the Region should consult the Agency's Indian policy and advise the Office of Federal Activities of orders issued against Federal facilities.)

In cases where the responsible party is not clearly known, the order should be issued to the most likely contributor(s) based on the type of contaminant(s) found in the PWS and/or USDW compared to current and past land practices in the area. As part of the order, EPA can require that a study be performed to more clearly determine the responsible parties. An example is a PWS which is contaminated with benzene, toluene, and xylene. Five gasoline service stations are located near the PWS. An order could require each of the service stations to test for leaks in their underground storage tanks.

EPA may even use Section 1431 authority to reach parties that are not responsible for the endangerment. orders to a nonresponsible party ordinarily should be limited to those instances where no responsible party exists or is suspected and the issuance of an order to a nonresponsible party is the most appropriate means to protect or mitigate the endangerment. For example, an order may require a PWS, contaminated by unknown polluters, to filter or relocate its water source.

Procedure for issuing a Section 1431 Order

Components of a Civil Order

Administrative

The recommended basic components of an administrative 1431 Order are:

- EPA's Statutory Authority
- Findings of Fact
- Conclusions of Law

- Conditions (or Actions) Ordered by the Emergency Order - (Should also contain a statement that requires the respondent to advise the Agency of his intentions to comply with the terms of the order in a specified short time frame, e.g, 72 hours).
- Name and Address of EPA Contact

Attachments 3 and 4 are examples of Section 1431 administrative orders for the PWSS Program. Attachment 5 is an example of a Section 1431 administrative order for the UIC Program.

Components of a 1431 Order

Civil Judicial

If a judicial order is sought, the Agency must still determine that an “imminent and substantial endangerment” exists. This should be done through a written determination or affidavit, provided by the RA or delegates, that the conditions that support the need for an action under Section 1431 have been met.

Degree of Support

Development of a Record

The issuance of a Section 1431 Order is an administrative action that must be supported by an adequate written record in order to survive a potential judicial challenge. Therefore, the Regions should ensure that the findings of fact in the order are adequately supported by documents in the record showing the basis for EPA’s technical determinations. Similarly, before bringing a judicial action under Section 1431, Regions should ensure that sufficient information has been compiled and can be presented to a court to support the action. This information would take the form of technical documents, other background materials, and memoranda to the file. EPA also may need to present information in the form of affidavits from the responsible EPA officials.

Absolute Proof Not Required

Even though EPA should strive to create a record basis to support its Section 1431 actions, the Regions should recognize that EPA does not need uncontroverted proof that contaminants are present in or likely to enter the water supply or that an imminent and substantial endangerment may be present before taking action under Section 1431.³¹ Similarly, EPA does not need uncontroverted proof that the recipient of the order is the person responsible for the contamination or threatened contamination. Courts generally will give deference to EPA’s technical findings of imminent and substantial endangerment. The purpose of Section 1431 actions is to prevent harm from occurring. Extensive

efforts to document the available information should be avoided, where the delay in obtaining such information or proof could impair attempts to prevent or reduce the hazardous situation. The Region may use, for example, sampling data from public and/or private wells, the exceedance of the unreasonable risk to health (URTH) level, data from toxicological studies, and the opinion of a toxicologist or other expert as evidence that an “imminent and substantial endangerment” may exist.

State and Local Authorities Have Not Acted

As stated previously, before taking an action under Section 1431, EPA must receive information that demonstrates that State and local authorities have not acted to protect public health. The Region should have a written basis for this finding, which may consist of a telephone log or written communications), that serves to document contact between EPA and State and local authorities.

Headquarters Contact

The Region is not required to receive concurrence from Headquarters before issuing an administrative Section 1431 Order. However, the Region may elect to receive advice from Headquarters prior to issuing the order, especially those Regions with no or little experience in issuing section 1431 Orders. OGWDW and OE, as in the past, are committed to providing feedback to the Regions within 48 hours. Consulting in advance with Headquarters program staff, OE and OGC may protect against subsequent adverse judicial determinations. In particular, due to issues of “pre-enforcement” judicial review as discussed previously, the Regions should not issue a SDWA Section 1431 Order jointly with a CERCLA Section 106 or RCRA Section 7003 Order without first consulting OGC and OE.

Headquarters has not delegated the authority under Section 1431 to the Region for a judicial referral. The Region must submit a Section 1431 civil judicial order to OE and OGWDW for concurrence. OE and OGWDW also will strive to provide feedback within 48 hours for any expedited judicial referral. If however, the referral under Section 1431 is not of an “emergency nature” (i.e., has not been expedited), the referral will be processed in the usual 35-day period.

Regardless of whether the Region prepares an administrative or civil judicial order, OE and OGWDW request that the Region submit copies of all final orders for their central files.

No Citizen Suits Under Section 1431

SDWA authorizes citizens suits against EPA when the Agency has failed to take actions that are mandatory under the statute. Because EPA’s authority to take action under Section 1431 is discretionary, citizen suits to compel EPA to take action under 1431 are not authorized.³²

FOOTNOTES

- 1 Section 1431, 42 U.S.C. Section 300(i) (emphasis added).

- 2 H.R. Rep. No. 1185, 93rd Cong., 2d Sess., 35-36, reprinted in, 1974 U.S. Code Cong. & Ad. News 6454, 6488 (“H.R. 93-1185”). The preventative intent of Section 1431 is apparent in the legislative history, which states:

the Committee intends that this language be construed by the courts and the Administrator so as to give protection of the public health. Administrative and judicial implementation of this authority must occur early enough to prevent the potential hazard from materializing.

- 3 Id. H.R. 93-1185, at 36, states that “section 1431 reflects the Committee’s determination to confer completely adequate authority to deal promptly and effectively with emergency situations which jeopardize the health of persons.” The Report further states that the administrative authority of Section 1431 should “not be used when the system of regulatory authority provided elsewhere in the bill could be used adequately to protect the public health.” Id.

- 4 See Id. at 35-36.

- 5 While “USDW” is not defined in the statute, SDWA Section 1421(d) makes it clear that the statute protects a broad category of waters. This section states that “[u]nderground injection endangers drinking water sources if such injection may result in the presence of ground water which supplies or can be reasonably expected to supply any public water system of any contaminant...” (emphasis added).

- 6 U.S. v. Conservation Chemical Co., 619 F. Supp. 162, 192 (W.D. Mo. 1985) (interpreting the term “endangerment” in CERCLA), citing Ethyl Corp. v. EPA, 541 F.2d 1, 18 (D.C. Cir. 1976), (en banc), cert. denied, E.I. du Pont de Nemours & Co. v. EPA, 426 U.S. 941 (1976) (interpreting the language “will endanger” in the Clean Air Act).

- 7 See Ethyl Corp. v. EPA, 541 F.2d at 13.

- 8 See U.S. v. Reilly Tar and Chemical Corp., 546 F. Supp. 1100, 1109-10 (D. Minn. 1982), quoting H.R. 93-1185; U.S. v. Conservation Chemical Co., 619 F. Supp. at 193-94. The CCC court, construing similar language in CERCLA, stated that the standard is especially lenient since it authorizes action “when there may be risk of harm, not just when there is a risk of harm.” Id. at 193 (emphasis in original).

- 9 See Ethyl Corp. v. EPA, 541 F.2d at 18.

- 10 See U.S. v. Conservation Chemical Co., 619 F. Supp at 193-94; B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (CERCLA action).
- 11 Dague v. City of Burlington, 935 F.2d 1343, 1356, (2d Cir. 1991); U.S. v. Ottati & Gross, Inc., 630 F. Supp. 1361, 1394 (D.N.H. 1985).
- 12 695 F. Supp. 1072, 1076 (E.D. Cal. 1988).
- 13 See Conservation Chemical Co., 619 F. Supp. at 194, citing legislative history of RCRA Section 7003.
- 14 See H.R. 93-1185 at 36. This view is underscored by the numerous other references in the legislative history to the discovery of carcinogens and potential carcinogens in an ever increasing number of water supplies. 1974 House Report, supra, at 6, 10-11, 35; 120 Cong. rec. H10789, H 19793-94, H10798-99, H10801-02 (daily ed. Nov. 19, 1974). This concern was reiterated and strengthened in subsequent Congressional reviews of the SDWA program. House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 96-186, 96th Cong., 1st sess. 4-6 (1979), and Senate Comm. on Environment and Public Works, S. Rep. No. 96-161, 96th Cong., 1st Sess. 3 (1979).
- 15 This interpretation is supported by H. Rep. 93-1185.
- 16 See Id.; See B.F. Goodrich v. Murtha, 697 F. Supp. 89, 96 (CERCLA action, quoting H. Rep. 93-1185).
- 17 See In Re FCX, Inc., 96 B.R. 49, 55 (Bkrtcy., E.D.N.C. 1989) (“even when there is an inordinate delay [by EPA], the court must find an immediate danger to public health if in fact one exists”).
- 18 695 F. Supp. 1072, 1076 (E.D. Cal. 1988).
- 19 Conservation Chemical Co., 619 F. Supp. at 194.
- 20 Id.
- 21 See H.R. 93-1185 at 35.
- 22 H.R. 93-1185 at 36.
- 23 United States v. Occidental Petroleum Corp., No. 79-989 (E.D. Cal. 1980).

- 24 See H.R. Rep. 93-1185 at 36. This implements legislative intent expressed in House Report 93-1185 to “direct the Administrator to refrain from precipitous preemption of effective State of local emergency abatement efforts.”
- 25 Congressional reports and floor debates support the view that Congress inserted this language in Section 1431 (and added certain procedural prerequisites before allowing Federal enforcement in a primacy State) simply to avoid duplication between the Federal and State enforcement and to preserve the primary responsibility for protecting the public at the State and local levels. *Id.* at 22-34, 35; S. Rep. No. 93-231, 93rd Cong., 1st Sess. 9, 10 (1973); 120 Cong. Rec. H10789, H10793-94 (daily ed. Nov. 19, 1974); 120 Cong. Rec. S20241-42 (daily ed. Nov. 26, 1974).
- 26 The legislative history supports this view. See H.R. Rep. 1185, at 35-36.
- 27 See Id. The House Report specifically mentions a number of these listed action as among those EPA may take.
- 28 SDWA Section 1431(b).
- 29 Guidance on CERCLA Section 106(a) Unilateral Administrative Orders for Remedial Designs and Remedial Actions, U.S. EPA, OSWER Directive No. 9833.0-1a, March 13, 1990. Guidelines for Using the imminent Hazard, Enforcement and Emergency Response Authorities of Superfund and Other Statutes, U.S. EPA, May 13, 1982; Final Revised Guidance Memorandum on the Use and Issuance of Administrative Orders Under Section 7003 of the Resource Conservation and Recovery Act (RCRA), U.S. EPA, September 26, 1984. Guidance on Using Order Authority under Section 112(r)(9) of the Clean Air Act, as Amended, and on Coordinated Use with Other Order and Enforcement Authorities, U.S. EPA, April 17, 1991.
- 30 See H.R. 93-1185 at 35.
- 31 See U.S. v. Conservation Chemical Co., 619 F. Supp. at 193 (because of scientific and medical uncertainties, proof with certainty is impossible).
- 32 See U.S. v. Hooker Chemicals & Plastics Corp., 101 F.R.D. 451, 455 (W.D.N.Y. 1984).

ATTACHMENT 1**Citation from 42 USC 330i, (SDWA Section 1431)**

SEC. 1431. (a) Notwithstanding any other provision of this title, the Administrator, upon receipt of information that a contaminant which is present in or is likely to enter a public water system or an underground source of drinking water may present an imminent and substantial endangerment to the health of persons, and that appropriate State and local authorities have not acted to protect the health of such persons, may take such actions as he may deem necessary in order to protect the health of such persons. To the extent he determines it to be practicable in light of such imminent endangerment, he shall consult with the State and local authorities in order to confirm the correctness of the information on which action proposed to be taken under this subsection is based and to ascertain the action which such authorities are or will be taking. The action which the Administrator may take may include (but shall not be limited to) (1) issuing such orders as may be necessary to protect the health of persons who are or may be users of such system (including travelers), including orders requiring the provision of alternative water supplies by persons who caused or contributed to the endangerment, and (2) commencing a civil action for appropriate relief, including a restraining order or permanent or temporary injunction.

(b) Any person who violates or fails or refuses to comply with any order issued by the Administrator under subsection (a)(1) may, in an action brought in the appropriate United States district court to enforce such order, be subject to a civil penalty of not to exceed \$5,000 for each day in which such violation occurs or failure to comply continues.